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No. 88-1678

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1988

RICHARD WALTON,
Petitioner,

VS.

SCOTT B. MERRIMAN,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

I

RESPONDENT IS UNABLE TO DEMONSTRATE THAT DEPUTY WALTON VIOLATED ANY "CLEARLY ESTABLISHED LAW" AT THE TIME OF THE ARREST, AND RESPONDENT MISSTATES THE RECORD OF THE CASE IN HIS OPPOSITION TO DEPUTY WALTON'S PETITION FOR WRIT OF CERTIORARI

In his opposing brief in No. 88-1678, respondent is unable to cite a single decision or statute demonstrating the breach of a "clearly established law," to support the opinion of the Ninth Circuit Court of Appeals. Respondent boldly asserts that the Ninth Circuit "amply considered the 'clearly established law,' " without any explanation as to the law purportedly considered.

Further, respondent's argumentative review of the facts misstates the record of the case. The most substantial misstatements will be addressed below.

First, despite respondent's own deposition testimony to the contrary (Pet. for Cert., p. 10, fn. 7), respondent begins his brief by claiming he was a teacher when arrested. The Ninth Circuit Court of Appeals incorrectly recited this fact, and respondent continues to inaccurately report his employment situation, apparently in an attempt to bolster his own credibility.

More significantly, respondent states, "Neither the half brother of the alleged victim nor the girlfriend who was the reported eyewitness to the event was personally interviewed or personally contacted by any member of law enforcement." (Res. Br. in Opp., p. 4.) In fact, Deputy Walton personally interviewed Mr. Ivey on two occasions, first soon after Mr. Ivey reported the abduction on the evening of July 16, 1986, and then again on the afternoon of July 17, 1986, when Mr. Ivey reported he observed a cut over Ms. Cantrell's eye and a scratch on her nose when she briefly returned home that day. (CR 24) While Deputy Walton had been dispatched to interview Mr. Ivey, Sergeant Marler established telephone contact with Ms. Martinez, less than one hour after Mr. Ivey's telephone call to the Sheriff's Department, and the information that Ms. Martinez confirmed the abduction was relayed to Deputy Walton while he was still in the field. (CR 23; CR 24)

Respondent attempts to imply that Ms. Martinez was an unreliable witness, by reference to the fact that Ms. Cantrell and Ms. Martinez were drinking prior to the incident. In a declaration signed May 27, 1987, Ms. Martinez states, "I had a couple of drinks, but did not feel intoxicated and had no difficulty perceiving events that night or recalling those events." (CR 22) In addition to verifying the kidnapping in the foregoing declaration, which was signed under penalty of perjury, Ms. Martinez confirmed her story when deposed on May 29, 1987. (CR 40)

Mr. Merriman testified at deposition that Ms. Martinez was "coherent" and that both Ms. Cantrell and Ms. Martinez were not "overly intoxicated" when he saw them at the Clam Beach Inn. (CR 42, p. 83, lns. 13-17) Sergeant Marler stated in a signed

declaration that Ms. Martinez "did not mumble, did not sound intoxicated" when he spoke with her, and he had no reason to doubt the truthfulness of her report of the incident. (CR 23) In summary, there are no facts to show Ms. Martinez was an unreliable eyewitness to the abduction, especially when she has maintained her version twice while under oath.

Respondent claims the abduction occurred some five hours before Mr. Ivey's 11:00 p.m. call to the Sheriff's Department. (Res. Br. in Opp., p. 4) Respondent's factual basis for this claim is not stated.[1] Ms. Martinez told Sergeant Marler that the Clam Beach abduction occurred at "approximately 2100 hours," about two hours before Mr. Ivey called the Sheriff's Department. (CR 23) Given the period of time needed for Ms. Martinez to return home to Arcata, California, and then to convey the whole incident to Mr. Ivey, who then called the Sheriff's Department, there is nothing unusual about this time lag.

Respondent also states the victim returned home "safely." (Res. Br. in Opp., p. 5) Webster's Ninth New Collegiate Dictionary (1987) variously defines the word "safely" as "healthy" or "unhurt." The fact that Ms. Cantrell returned home with a cut above her eye and her nose scratched, a matter ignored in Respondent's Brief, raises the question as to whether Ms. Cantrell truly returned home "safely."

Lastly, respondent also claims Ms. Cantrell called the Sheriff's Department on July 17, 1986, and "emphatically stated that no kidnapping had occurred." (Res. Br. in Opp., p. 5) As petitioner has already indicated (Pet. for Cert., p. 4), the records from the

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[1] All citations in Respondent's Brief in Opposition refer to CR 24. This citation is to the Declaration of Deputy Walton, which has some of the investigative reports attached as exhibits. Many other facts in Respondent's Brief are also not supported by reference to this citation. The grossest inaccuracy is the use of this citation to support the claim Ms. Cantrell contacted the Sheriff's Department on July 17, 1986. CR 24 also makes no reference to drinking by anyone and there is no competent evidence anywhere in the record to establish that the District Attorney's Office advised that Mr. Merriman be released at the urging of Ms. Howell.

Sheriff's Department show that this call was made July 18, 1986, and there are no facts to establish Deputy Walton knew of this call before Merriman's arrest, if it in fact so occurred. The report of Detective Vulich shows something other than an emphatic denial by Ms. Cantrell. In pertinent part, the report reads as follows:

> "On 7-18-86, I received and reviewed this case.
>
> "I called for Ms. Cantrell, 677-3700, but there was no answer, 1500 hours.
>
> "I then called W #1 Martinez and inquired as to Ms. Cantrell (sic) whereabouts and welfare. She said she talked with V Cantrell's brother, Bill, last night who told her V Cantrell was home and okay. I request (sic) W Martinez attempt to contact V Cantrell and have her contact me.
>
> "At about 1525 hrs., V Cantrell called me. When asked, she said she was okay. She said that she 'did not want to pursue prosecution' and that 'she was going to get a restraining' (sic) to keep S Merriman away from her." (CR 25)

II

CONCLUSION

The record in this case demonstrates there is no material dispute as to the facts available to Deputy Walton at the time he arrested Mr. Merriman. The arrest was founded upon the eyewitness reports of Ms. Martinez and Mr. Ivey, following a thorough investigation. Based on the "clearly established law" at the time of the arrest, Deputy Walton had probable cause to arrest Mr. Merriman. Probable cause was not vitiated simply because Mr. Merriman denied the abduction when confronted by the officer. (Cf. *Rodgers v. Lincoln Towing Service, Inc.*, 771 F.2d 194 (7th Cir. 1985).)[2]

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[2] *Rodgers* involved the appeal of a dismissal under Rule 12(b)(6) to a 42 U.S.C. § 1983 claim based on unlawful arrest. In *Rodgers*, at 200-201, the court stated, "Pagano [the arresting officer] was confronted by two Lincoln Towing employees who steadfastly maintained they had

As this Honorable Court has stated, [t]he Constitution does not guarantee that only the guilty will be arrested." (*Baker v. McCollum*, 443 U.S. 137, 99 S.Ct. 2689, 4 L.Ed.2d 433 (1979).) "If it did, Section 1983 would provide a cause of action for every defendant acquitted—indeed, for every suspect released." (*Id.*)

Based upon all the foregoing, petitioner respectfully urges that Deputy Walton had probable cause for Merriman's arrest, that Deputy Walton's Petition for Writ of Certiorari be granted, and that the Court of Appeals be summarily reversed.

Respectfully submitted,

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seen Rodgers throw the paint on the building, and by Rodgers, who maintained his innocence. We cannot fault Pagano for believing Mash and Eisgrau over Rodgers, even though it turned out that Mash and Eisgrau may have been lying. Apart from the conclusion that Pagano 'knew' Mash and Eisgrau were lying, Rodgers has not alleged a single fact that would indicate Pagano thought Rodgers was innocent. Evidently nothing occurred that would suggest that the two employees might be lying."